

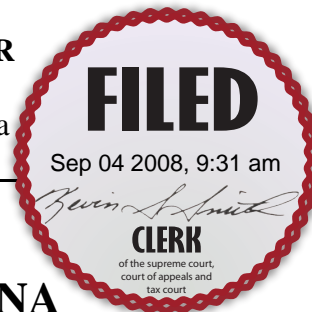
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**IN THE
COURT OF APPEALS OF INDIANA**

JAMES T. FERGUSON, on behalf of)
DEPENDABLE SANDBLAST & DUBURRING)
CORPORATION, and individually,)

Appellant-Plaintiff,)

vs.)

No. 49A04-0802-CV-73

CHARLES D. CANDLER, KENNETH)
CANDLER, CK ENTERPRISES and)
DEPENDABLE SANDBLAST &)
DEBURRING CORPORATION,)

Appellees-Defendants.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Reuben B. Hill, Judge
Cause Nos. 49D10-0103-CP-429

September 4, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a bench trial, James Ferguson appeals the trial court's judgment in favor of Charles Candler and Kenneth Candler on various claims relating to a fallout over the parties' ownership of Dependable Sandblast & Deburring Corporation ("Dependable"), a closely-held Indiana corporation. The Candlers also cross-appeal with respect to several aspects of the trial court's overall damages award. Ferguson's appeal and the Candlers' cross-appeal raise the following issues for our review:

1. Whether the trial court properly concluded that Ferguson failed to prove damages resulting from the Candlers' breach of fiduciary duty;
2. Whether the trial court properly concluded that Ferguson was not entitled to relief on his claim against the Candlers and Dependable for damages relating to clean-up costs of his property;
3. Whether the trial court properly concluded that Ferguson was not entitled to relief on his claim against the Candlers for constructive fraud;
4. Whether the trial court properly concluded Ferguson was not entitled to relief on his claim against the Candlers for damages they allegedly caused while Dependable leased Ferguson's property;
5. Whether the trial court properly concluded Ferguson was not entitled to attorney fees under the Crime Victims Statute; and
6. Whether the trial court properly concluded Ferguson breached his fiduciary duty to the Candlers and, if so, whether the trial court properly concluded the Candlers failed to prove damages resulting from Ferguson's breach of fiduciary duty.

We affirm in some respects, concluding the trial court properly concluded Ferguson failed to prove damages resulting from the Candlers' breach of fiduciary duty, was not entitled to relief on his claim for constructive fraud, and was not entitled to attorney fees under the Crime Victims Statute. However, we reverse one of the trial court's damages awards against Ferguson and remand two others for the trial court to enter findings and conclusions thereon.

Facts and Procedural History

This appeal is the third time we have addressed this litigation. Our earlier opinions (particularly the second one) provide an extensive recitation of the facts and procedural history of the case, see Ferguson v. Candler, 2007 WL 1651234, at *1-4 (Ind. Ct. App., Jun. 8, 2007); Ferguson v. Candler, No. 49A04-0206-CV-265, slip op. at 2-4 (Ind. Ct. App., Jan. 17, 2003), and the following overview borrows heavily from those opinions, as well as the trial court's factual findings.

In October 1982, Ferguson and the Candlers formed Dependable for the purpose of purchasing the assets of Deburr & Supply, Inc. ("Deburr"), and using those assets to operate a sandblasting and deburring business.¹ Ferguson and the Candlers were Dependable's sole directors, officers, and shareholders, with Ferguson owning 40 percent and serving as Vice President, Charles owning 40 percent and serving as President, and Kenneth owning 20 percent and serving as Secretary. The Candlers also were full-time employees of Dependable and ran its day-to-day operations. Except for a brief period in 1983 and 1984 when he worked part time, Ferguson was not an employee of Dependable. Instead, Ferguson operated a separate sole proprietorship, J.T. Ferguson Excavating and Demolition, whose place of business was located next to Dependable's.

In January 1983, Deburr sold its assets to Dependable, and Dependable commenced operations shortly thereafter. However, Deburr did not sell the property on which Dependable conducted its operations because Dependable was unable to secure financing.

¹ Sandblasting is "a process that cleans stone or metal surfaces with a high-pressure velocity blast of air-carrying sand." Ferguson, 2007 WL 1651234, at *1 n.1 (citation omitted). Deburring "is a process that smoothes out the rough edges of a surface or object." Id. at *1 n.2.

Instead, Deburr agreed to lease the property to Dependable until September 1984, at which time Dependable would have the option to purchase it. In March 1983, unbeknownst to the Candlers, Ferguson purchased the property “with the full knowledge and understanding of Dependable’s [option]” and continued leasing it to Dependable. Appellant’s Supplemental Appendix at 32. By September 1984, Dependable was in a position financially to purchase the property, but it declined to do so in part because the Candlers did not think the option had survived Ferguson’s purchase and in part because the Candlers believed that Ferguson would put his interests as a director, officer, and shareholder of Dependable before his interests as a landlord.

Ferguson initially charged Dependable monthly rent in the amount of \$460, which was the same amount Deburr had charged. When that lease expired in September 1984, Ferguson entered into month-to-month oral leases with Dependable for the next eighteen years. During that time, Ferguson gradually raised the monthly rent until it reached \$2,250 in 1996 and stayed at that rate until Dependable vacated the premises in October 2003. Ferguson’s ownership of the real estate allowed him to assert, as the trial court put it, “operational control” over Dependable – in other words, as landlord, Ferguson had more influence over Dependable’s business decisions than is typical of a minority shareholder. Id. at 35. A prime example of Ferguson’s exercise of operational control was that whenever the Candlers voted to increase their salaries, Ferguson would respond by raising the monthly rent to compensate himself equally. As such, the Candlers were reluctant to raise their salaries, and they remained “underpaid considering their level of responsibility, their skill, their leadership and labor, their average weekly workload, and the relative success of the business.” Id. at 36.

Ferguson's heavy-handed tactics as Dependable's landlord caused obvious friction between him and the Candlers, and also resulted in the Candlers being less than open with Ferguson. In November 1990, a customer of Dependable, Martinsville Industries, owed over \$8,000 to Dependable and was at risk of going bankrupt. Charles entered into an agreement with the owner of Martinsville whereby the Candlers would take over Martinsville's business and make periodic payments to Martinsville's owner, who in turn would repay the \$8,000 debt to Dependable. To that end, the Candlers formed a partnership, CK Enterprises, which they operated after working hours on Ferguson's property and with Dependable's equipment. Martinsville's owner eventually repaid the debt to Dependable, but CK Enterprises continued operating based on business it received from one of Martinsville's former customers. The Candlers did not inform Ferguson of this partnership, which generated over \$250,000 in revenue from 1990 to 2005.

On March 19, 2001, Ferguson filed a sixteen-count complaint against the Candlers, Dependable, and CK Enterprises, including a claim of breach of fiduciary duty against the Candlers as shareholders of Dependable, a claim for damages against the Candlers and Dependable relating to clean-up costs of the property, a claim for damages against the Candlers for constructive fraud, and a claim for treble damages and attorney fees under the Crime Victims Statute based on the Candlers' alleged criminal mischief.² On the evening of March 6, 2002, Ferguson changed the locks on the property, took Dependable's checkbook and cash box, and wrote himself a check for \$10,600, representing what he believed was his

² We mention here only the claims that are relevant to this appeal. For a more detailed listing of Ferguson's claims, see Ferguson, 2007 WL 1651234, at *2.

share of Dependable. On March 7, 2002, the Candlers entered one of the buildings on the property by breaking three doors.

On April 24, 2002, Ferguson amended his complaint to include a claim for ejectment and immediate possession, having previously initiated eviction proceedings in the Marion County Small Claims Court in the Fall of 2001.³ On June 6, 2002, the Candlers filed a five-count counterclaim against Ferguson, including a claim of breach of fiduciary duty against Ferguson as a director and officer of Dependable. The parties initially tried to settle their dispute, but when negotiations failed, the litigation shifted its focus to Dependable's right to possess the property. On September 29, 2003, the trial court granted Ferguson's motion for summary judgment on that issue, ordering the Candlers and Dependable to clean up the property by October 1, 2003, and to vacate by October 15, 2003. The Candlers and Dependable vacated the property on October 15th and relocated to leased property located four blocks away.

On February 8, 9, and March 1, 2005, the trial court presided over a bench trial on the remaining claims and counterclaims, hearing testimony from Ferguson, the Candlers, other employees of Dependable, Dependable's accountant, and several other witnesses, and admitting over 2,000 pages of documents into evidence. On March 22, 2006, the trial court entered findings of fact and conclusions of law. Based on these findings and conclusions, the trial court ordered that Ferguson return \$10,600 to Dependable (representing the check Ferguson wrote to himself on March 6, 2002) and that Ferguson and the Candlers split Dependable's assets according to their respective shares. On appeal by Ferguson, this court

remanded to the trial court because its “extraordinarily limited findings of fact do not provide a sufficient basis for us, in our capacity as a reviewing court, to draw legal conclusions therefrom.” Ferguson, 2007 WL 1651234, at *5. On January 7, 2008, the trial court filed amended findings of fact and conclusions of law with this court. Based on these amended findings and conclusions, the trial court ordered again that Ferguson return \$10,600 to Dependable and that Ferguson and the Candlers split Dependable’s assets according to their respective shares, valuing the company at \$150,000 plus the \$10,600 Ferguson was obligated to return plus the fair market value of Dependable’s equipment and tools. Although the trial court concluded both Ferguson and the Candlers breached their fiduciary duties, it refused to award either party damages because “both parties failed to prove their actual economic loss caused by the breach.” Appellant’s Supp. App. at 61. Ferguson now appeals, and the Candlers now cross appeal.

Discussion and Decision

I. Standard of Review

In its pretrial order, the trial court stated it would enter findings of fact and conclusions of law. In our earlier opinion, we treated the trial court’s statement as the functional equivalent of entering findings and conclusions pursuant to a party’s request. See id. at *4 (“[W]here, as here, the trial court indicates that it intends to enter findings of fact and conclusions of law and accepts proposed findings and conclusions from the parties, the parties are entitled to rely on that representation and need not make an additional, repetitive request for findings and conclusions.”). The parties do not dispute our assessment, and we

³ Our first opinion concerned issues relating to these proceedings. See Ferguson, No. 49A04-0206-

therefore apply the standard of review applicable where a trial court enters findings and conclusions pursuant to a party's request.

That standard requires us to first determine whether the evidence supports the findings and then determine whether the findings support the judgment. Mayberry Cafe, Inc. v. Glenmark Constr. Co., Inc., 879 N.E.2d 1162, 1172 (Ind. Ct. App. 2008), trans. denied. We will not set aside the findings or judgment unless clearly erroneous and we must give due regard to the trial court's assessment of witness credibility. Ind. Trial Rule 52(A); Mayberry Cafe, 879 N.E.2d at 1172-73. Findings are clearly erroneous when the record lacks evidence or reasonable inferences to support them. Wenzel v. Hopper & Galliher, P.C., 779 N.E.2d 30, 36 (Ind. Ct. App. 2002), trans. denied. A judgment is clearly erroneous when our review of the record leaves us with a firm conviction that a mistake has been made. Id. We may affirm the trial court's judgment on any legal theory supported by the findings. Mitchell v. Mitchell, 695 N.E.2d 920, 923 (Ind. 1998). However, where a trial court's findings fail to address a particular issue, we may not affirm the judgment on any legal theory supported by the record, and instead must remand to the trial court for its consideration in the first instance. See Shafer v. Lambie, 667 N.E.2d 226, 231 (Ind. Ct. App. 1996).

II. Ferguson's Appeal

A. Breach of Fiduciary Duty

CV-265, slip op. at 4-10; see also Ferguson, 2007 WL 1651234, at *3.

Ferguson argues the trial court improperly concluded that he failed to prove damages resulting from the Candlers' breach of fiduciary duty.⁴ We note initially that the trial court made clear in its findings and conclusions that the Candlers breached their fiduciary duty to Ferguson by failing to inform him of their formation of CK Enterprises. Indeed, it is worth quoting at length from the trial court's findings on this point:

CANDLERS' BREACH OF FIDUCIARY DUTY

. . . When Charles was presented with the Martinsville Industries problems, he was required to make business decisions that would protect the

⁴ Ferguson also intersperses brief arguments that the trial court improperly refused to award punitive damages relating to the Candlers' breach and that the trial court "did not address" Ferguson's claim that the Candlers' use of Dependable's assets to pay their attorney fees was a breach of fiduciary duty. Appellant's Brief at 24. With respect to Ferguson's punitive damages argument, such damages are permitted for a breach of fiduciary duty, but the standard of proof is high. See Erie Ins. Co. v. Hickman, 622 N.E.2d 515, 520 (Ind. 1993) (stating that an award of punitive damages in a tort action requires "clear and convincing evidence that the defendant 'acted with malice, fraud, gross negligence, or oppressiveness which was not the result of a mistake of fact or law, honest error or judgment, overzealousness, mere negligence, or other human failing, in the sum [that the jury believes] will serve to punish the defendant and to deter it and others from like conduct in the future'" (quoting Bud Wolf Chevrolet, Inc. v. Robertson, 519 N.E.2d 135, 137-38 (Ind. 1988))). Ferguson does not mention this standard, but claims that the Candlers' operation of CK Enterprises "would be sufficient factual basis for an award of punitive damages." Appellant's Br. at 24. Putting to the side our conclusion below that the trial court properly concluded the Candlers' operation of CK Enterprises was not a breach of fiduciary duty, Ferguson's burden on appeal is to show that the trial court clearly erred in refusing to award punitive damages, and merely stating that he presented a "sufficient factual basis" fails to meet this standard on its face.

With respect to Ferguson's second argument, we agree the trial court did not address his claim that the Candlers' use of Dependable's assets to pay their attorney fees was a breach of fiduciary duty. However, the trial court's omission was understandable, as Ferguson did not incorporate this argument into his proposed findings of fact and conclusions of law. As such, Ferguson has waived this argument. See Wenzel, 779 N.E.2d at 44 (concluding the appellant waived his argument where "there is no corresponding proposed conclusion of law or portion of the proposed judgment that addresses the issue. [The Appellant] may not ask this court to grant relief he failed to request from the trial court"). Waiver notwithstanding, Ferguson's argument overlooks that Dependable's articles of incorporation contain an indemnification clause requiring Dependable, with some exceptions, to pay attorney fees for its officers and directors for lawsuits brought against them. See Plaintiff's Exhibit 1, at 8. Although the articles of incorporation do not require Dependable to pay the attorney fees of its shareholders under similar circumstances, Ferguson sued the Candlers in all three capacities, and the testimony and documents admitted into evidence to prove Dependable paid the Candlers' attorney fees do not sufficiently specify which fees were attributable to claims against the Candlers as directors and officers and which were attributable to claims against the Candlers as shareholders. See Transcript at 575-78; Plaintiff's Exhibit 74; Plaintiff's Exhibit 75. Thus, to the extent this evidence proves a breach of fiduciary duty by the Candlers, the damages resulting from that breach are speculative.

interest of the company. Charles decided that Martinsville's problems did not present a corporate opportunity for Dependable. Charles supported his decision on a rational basis, expressing concern that Dependable may not receive over \$8,000.00 [in] debt owed by Martinsville if their business failed. There is no dispute that Dependable was very busy at the time and employing additional personnel to handle the workload of the Martinsville account did not seem to be the right decision. Charles'[s] decision to undertake the additional work and income for himself and his brother would solve several problems. He and his brother needed additional income for which they were prepared to work extra hours. Dependable would receive monies owed by Martinsville Industries that otherwise might be lost in bankruptcy. This Court is persuaded by the undisputed testimony of all the witnesses that Charles made a business decision that he thought served both Dependable's and a self interest, as well. In a perfect world Charles and Kenneth should have informed Ferguson what they were doing and perhaps they would have if they were not so intimidated by him and the environment he created.

...
... The Candlers were thoroughly intimidated by Ferguson and determined a path of least resistance in deciding not to tell him about creating C.K. Enterprises. They should have informed Ferguson of their plan and failing to do so was their only mistake. The Candlers did, in fact, breach their duty to Ferguson, but not at the level of severity as did Ferguson.

Appellant's Supp. App. at 56-58; see also id. at 60 ("The Candler[s]' failure to inform Ferguson about C.K. Enterprises was a breach of their duty to Ferguson."). The trial court then went on to conclude that although the Candlers' failure to inform Ferguson of CK Enterprises was a breach of fiduciary duty, Ferguson was not entitled to damages because he "failed to prove . . . actual economic loss caused by the breach." Id. at 61.

To support his argument that this conclusion was improper, Ferguson cites as proof of damages the trial court's finding that CK Enterprises made over \$250,000 in revenue from 1990 to 2005. See Appellant's Br. at 23 ("Contrary to the [trial] court's conclusion, Ferguson clearly proved damage. The [trial] court itself found that the Candlers had reaped more than \$250,000 from their secret business."); id. at 24 ("In conclusion, the trial court

correctly found that the Candlers breached their fiduciary duties, but it erred by not awarding any damages. The [trial] court found that the Candlers made more than \$250,000 without adjustment for interest. Yet, the [trial] court allowed them to keep every penny.”). Implicit in this argument is that by operating CK Enterprises, the Candlers usurped a corporate opportunity and therefore breached their fiduciary duty.⁵

Usurping a corporate opportunity is a breach of fiduciary duty, see Hartung v. Architects Hartung/Odle/Burke, Inc., 157 Ind. App. 546, 556, 301 N.E.2d 240, 244 (1973) (“The general rule is that the fiduciary cannot lure away corporate business or clients which in equity and fairness belongs to his corporation.”), and we agree with Ferguson that one way to prove damages resulting from such a breach is to show the usurped opportunity generated revenue (or, perhaps more accurately, profit) that would have otherwise gone to the company. The problem with Ferguson’s argument, however, is that the trial court found the Candlers breached their fiduciary duty because they failed to inform Ferguson of CK Enterprises, not because their operation of CK Enterprises usurped a corporate opportunity. See Appellant’s Supp. App. at 60 (“The Candler[s’] failure to inform Ferguson about C.K. Enterprises was a breach of their duty to Ferguson.”). Ferguson also overlooks the trial court found that “Ferguson failed to present any evidence that tended to show Dependable had existing capacity to absorb the Martinsville Industries workload or that it would otherwise be economically feasible to employ another worker (either full or part-time) to handle additional workload” and that “[i]t is undisputed that had CK Enterprises not taken the job from

⁵ Ferguson explicitly makes this argument in his reply brief. See Appellant’s Reply Brief at 4 (“It is obvious that the Candlers usurped a corporate opportunity of Dependable and lined their own pockets with more than \$250,000, while keeping the business secret from Ferguson.”).

Martinsville Industries, Dependable Sandblast did not have reasonable expectations that it would have continued to [receive business from Martinsville] or have been paid the [\$8,000 debt].” Id. at 45. These findings foreclose a conclusion that CK Enterprises’ revenue constitutes damages, let alone damages as a matter of law, because regardless of whether the Clanders informed Ferguson of CK Enterprises, Dependable nevertheless would not have been in a position to pursue the business CK Enterprises ultimately pursued.⁶ Thus, it follows that the trial court’s conclusion that Ferguson failed to prove damages resulting from the Clanders’ breach was not clearly erroneous.

B. Clean-Up Costs of Property

Ferguson argues the trial court improperly concluded he was not entitled to relief on his claim for damages relating to clean-up costs of his property. Ferguson’s claim for clean-up costs is actually two claims, one for clean-up costs against Dependable and the Clanders under the Environmental Legal Action statute, Indiana Code chapter 13-30-9, which permits a person to recover damages in the form of removal costs against anyone that caused or contributed to the release of hazardous substances onto or beneath the person’s property, see Ind. Code § 13-30-9-2; and another for clean-up costs against Dependable and the Clanders based on their alleged failure to comply with the trial court’s September 29, 2003, order that they “clean[] up in a professional manner all spent sand, debris, and waste” on Ferguson’s

⁶ We note that Ferguson does not challenge any of these findings as clearly erroneous, and our review of the record, particularly Charles’s testimony, convinces us that sufficient evidence supports the trial court’s finding that Dependable was not in a position to pursue the business opportunity from Martinsville. This finding supports the reasonable inference that Dependable would in fact not have pursued the opportunity regardless of the Clanders’ disclosure to Ferguson. Although Charles’s testimony on these points was self-serving, it was within the trial court’s discretion to credit it, as our standard of review does not permit

property by October 1, 2003. Appellant's Appendix at 188. The trial court concluded that Ferguson was not entitled to relief on the first claim, and Ferguson does not challenge this conclusion on appeal. The trial court, however, did not enter findings and conclusions addressing Ferguson's second claim, despite the fact that the parties provided the trial court with extensive evidence and arguments relating to this claim. We therefore remand to the trial court with instructions that it consider the evidence and arguments relating to this claim and enter findings and conclusions thereon. See Shafer, 667 N.E.2d at 231 (remanding to the trial court where it entered findings and conclusions pursuant to a party's request and the trial court's findings did not address a particular issue).

C. Constructive Fraud

Ferguson argues the trial court improperly concluded he was not entitled to relief on his claim against the Candlers for constructive fraud. To prove constructive fraud, Ferguson was required to establish the following elements:

1. A duty existing by virtue of the relationship between the parties;
2. A violation of that duty by the making of deceptive material misrepresentations of past or existing facts or remaining silent when the duty to speak exists;
3. Reliance thereon by the complaining party;
4. Injury to the complaining party as a proximate result of the reliance; and
5. The gaining of an advantage by the party to be charged at the expense of the complaining party.

Marathon Oil Co. v. Collins, 744 N.E.2d 474, 480 (Ind. Ct. App. 2001). The trial court concluded that "[s]ince the Court has already found that criminal conduct was not part of either party's actions, a claim for constructive fraud herein fails." Appellant's Supp. App. at

us to second-guess the trial court's assessment of witness credibility. See Ind. Trial Rule 52(A); Mayberry

52. The parties agree that this conclusion was clearly erroneous, as establishing criminal conduct is not a predicate to establishing constructive fraud. Nevertheless, our standard of review permits us to affirm the trial court's conclusion on any basis supported by the findings. See Mitchell, 695 N.E.2d at 923. In this respect, Ferguson's sole argument supporting his constructive fraud claim is that the Candlers "usurped a corporate opportunity and raked in more than \$250,000 over 14 years." Appellant's Br. at 31. However, we have already concluded the trial court properly rejected Ferguson's argument that the Candlers usurped a corporate opportunity, see supra, Part II.A., and it therefore follows that a claim for constructive fraud based on such a theory also must fail.

D. Damages to Property

Ferguson argues the trial court improperly concluded he was not entitled to relief for damages to his property, specifically \$9,678.83 in damages to several buildings on the property and \$1,187.70 in damages to three doors that Charles admittedly kicked in when he entered the property on March 7, 2002. The trial court concluded that Ferguson was not entitled to damages for the former because they were the "result of normal wear and tear, and age" and that Ferguson was not entitled to damages for the latter because they were the "result of [Ferguson's] ill-advised lock-out of [the Candlers]." Appellant's Supp. App. at 41.

Ferguson does not challenge the trial court's conclusion that the alleged \$9,678.83 in damages was the result of normal wear and tear,⁷ but does argue that the trial court's refusal

Cafe, 879 N.E.2d at 1172-73.

⁷ Ferguson's failure to challenge this conclusion appears to be based on a misconception that the alleged \$9,678.83 in damages was either related to the Candlers' March 7, 2002, entry or was otherwise intentional conduct. See Appellant's Br. at 31 ("Candlers broke into the real estate after Ferguson had put up a blockade, and they admittedly caused damage. . . . Ferguson put on evidence through a contractor that it

to award \$1,187.70 in damages for the doors was improper because Charles admitted he kicked them in. See Transcript at 575 (“Q And at the time that you kicked [the doors] in you did damage to Mr. Ferguson’s property, didn’t you? A Damaged the doors.”). The trial court apparently concluded Ferguson was not entitled to damages for the doors based on the equitable doctrine of unclean hands, as it found that such damages were the “result of [Ferguson’s] ill-advised lock-out of [the Clanders].” Appellant’s Supp. App. at 41.

The doctrine of unclean hands precludes a person from obtaining equitable relief if the person is guilty of intentional wrongdoing and the wrongdoing has an immediate and necessary relation to the issue being litigated. See Shriner v. Sheehan, 733 N.E.2d 833, 847-48 (Ind. Ct. App. 2002), trans. denied. Here, Ferguson sought the actual cost to replace the doors. As such, his claim is not one for equitable relief, but for actual monetary damages. See Mercho-Roushdi-Shoemaker-Dilley-Thoraco-Vascular Corp. v. Blatchford, 742 N.E.2d 519, 526 (Ind. Ct. App. 2001) (explaining that a claim for damages that is “calculable in economic terms” and “with certainty and predictability” generally is not a claim for equitable relief). As such, the trial court’s application of the doctrine of unclean hands was clearly erroneous. Moreover, because Charles admitted to causing the damage and Ferguson presented evidence of the cost to repair such damage, Ferguson is entitled to recover \$1,187.70 from the Clanders as a matter of law.

would cost \$1,187.70 and \$9,678.83 to repair the damage.”). Our review of the record, however, indicates that the alleged \$9,678.83 in damages had nothing to do with the Clanders’ March 7, 2002, entry or was otherwise the result of intentional conduct. Instead, these alleged damages appear to merely be incidental to Dependable conducting sandblasting operations on Ferguson’s property for twenty years. Regardless, because Ferguson did not present any evidence regarding the parties’ understanding of what constituted normal wear and tear under their lease, we cannot say that the trial court’s conclusion was clearly erroneous.

E. Attorney Fees Under the Crime Victims Statute

Ferguson argues the trial court improperly concluded he was not entitled to attorney fees under the Crime Victims Statute.⁸ That statute permits a person to recover attorney fees in a civil action if the person suffered a “pecuniary loss” as a result of another’s violation of one of several crimes listed in the statute, including theft, criminal conversion, and criminal mischief. See Ind. Code § 34-24-3-1. Ferguson’s sole argument supporting underlying criminal activity appears to be that the Candlers usurped a corporate opportunity. See Appellant’s Br. at 31-32 (“The Candler brothers secretly took Dependable’s business and cheated Ferguson out of the profits. Such dishonest deception and conversion justify an award of attorneys fees . . . under [the Crime Victims Statute].”). Again, we have already concluded the trial court properly rejected Ferguson’s claim that the Candlers usurped a corporate opportunity, see supra, Part II.A., and Ferguson does not attempt to explain why the trial court’s finding that “neither party presented sufficient evidence at trial to support a finding that the parties acted with criminal intent” was clearly erroneous. Appellant’s Supp. App. at 50. Thus, it follows that the trial court properly concluded Ferguson was not entitled to attorney fees under the Crime Victims Statute.

III. Candlers’ Cross Appeal

The Candlers argue the trial court improperly concluded that they failed to prove damages resulting from Ferguson’s breach of fiduciary duty. Specifically, the trial court concluded that although “Ferguson’s ownership of the land and his systematic increase of the

⁸ Ferguson also argued at trial that he was entitled to attorney fees as a result of bringing derivative claims on behalf of Dependable, but does not challenge on appeal the trial court’s refusal to award attorney fees on the basis of such claims. See Appellant’s Br. at 31 (“Ferguson’s claim for attorney fees was not based

rent created an ongoing breach of his duty to the Candlers,”⁹ appellant’s supp. app. at 55, the Candlers were not entitled to damages because they “failed to prove . . . actual economic loss caused by the breach,” id. at 61.

Before addressing the Candlers’ challenge to the trial court’s conclusion, we note two arguments by Ferguson: 1) there is insufficient evidence to support the trial court’s finding that Ferguson breached his fiduciary duty; and 2) even if sufficient evidence exists and the Candlers have proved damages from the breach, such damages are time-barred by the statute of limitation. Ferguson’s first argument is without merit, as this court has held that maintaining a landlord-tenant relationship with a closely-held corporation in which the landlord also serves as an officer, director, or shareholder may constitute a breach of fiduciary duty, see Hartung, 157 Ind. App. at 555, 301 N.E.2d at 244-45; cf. G & N Aircraft, 743 N.E.2d at 227 (stating in dicta that the defendant’s “threat to evict [the corporation] was made in his capacity as an individual landlord. Presumably, if he held no position in [the corporation] this would have been a lawful act on his part”); William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Private Corporations, § 865 (2002) (“It is the general rule

solely on a derivative theory. He proved his entitlement to attorney fees under [the Crime Victims Statute].”).

⁹ The Candlers also claim they are entitled to damages because they were underpaid, presumably on a theory that Ferguson’s “operational control” over Dependable constituted a breach of fiduciary duty. We note initially that we are skeptical of the Candlers’ claim because most breach of fiduciary claims based on officer or employee compensation involve compensation that is excessive, see, e.g., Lowry v. Lowry, 590 N.E.2d 612, 621-22 (Ind. Ct. App. 1992), trans. denied; Krukemeier v. Krukemeier Mach. & Tool Co., Inc., 551 N.E.2d 885, 887-88 (Ind. Ct. App. 1990), thus allowing for a straightforward damages calculation requiring the breaching party to return to the corporation the percentage of compensation deemed excessive, see Prime Mortg. USA, Inc. v. Nichols, 885 N.E.2d 628, 659 (Ind. Ct. App. 2008) (explaining that disgorgement is a proper remedy where a breach of fiduciary duty is predicated on excessive compensation). Nevertheless, we need not resolve whether a breach of fiduciary duty may be predicated on under compensation, as the trial court merely found that the Candlers were “underpaid,” appellant’s supp. app. at 36; that finding does not support a conclusion that the Candlers’ compensation rose to the level of a breach of fiduciary duty, see G & N Aircraft v. Boehm, 743 N.E.2d 227, 239 (Ind. 2001) (“The standard of proof in compensation cases requires a plaintiff shareholder to show the compensation is unjust, oppressive, or fraudulent.”).

that a director may not personally purchase property under lease to the corporation.”); id. at § 884 (“Directors are not entitled to profits beyond the earnings on their stock, proper compensation and expenses.”), and the evidence clearly established that Ferguson put his interests as a landlord before his interests as a director, officer, and shareholder of Dependable by purchasing the property and by raising the rent in response to the Candlers’ proposals for higher salaries.

We turn now to the Candlers’ challenge to the trial court’s conclusion before addressing Ferguson’s second argument. To prove damages from Ferguson’s breach of fiduciary duty, the Candlers admitted an appraisal report and accompanying testimony from the appraiser indicating that since at least 1991, the amount of monthly rent Ferguson charged Dependable exceeded the fair market monthly rental value for similarly-situated properties. See Defendants’ Exhibit G, at 2 (stating the fair market monthly rental value in terms of square feet from 1986 to 2004); Defendants’ Exhibit GG, at 1 (stating the yearly rental amount Ferguson actually charged); Tr. at 414-31 (testimony of Candlers’ appraiser). The trial court’s findings, however, fail to address this evidence. Although we realize that one answer to this failure is that the trial court necessarily rejected this evidence in concluding the Candlers failed to prove damages, we are not convinced this is the case because in at least one other part of the trial court’s findings and conclusions it stated explicitly that it was rejecting similar evidence. See Appellant’s Supp. App. at 36 (“The Plaintiff’s expert testimony regarding compensation was not reasonable in light of evidence presented by the Defendants[’] expert and all other evidence presented at trial.”). As such, we are not convinced the trial court’s conclusion that the Candlers failed to prove damages

reflects its considered judgment, and therefore remand this issue for it to make findings and conclusions thereon.

Our decision to remand this issue brings us to Ferguson's second argument, namely, that the Candlers' claim is time-barred (or at least partially time-barred) by the statute of limitation. An action for breach of fiduciary duty is subject to a two-year statute of limitation. See Ind. Code § 34-11-2-4; Shriner, 773 N.E.2d at 846. As such, the Candlers are time-barred from presenting evidence of damages from Ferguson's breach before June 6, 2000, which is two years before the date they filed their counterclaim. The trial court is, however, free to consider evidence of damages after this date on remand.¹⁰

Conclusion

The trial court properly concluded Ferguson failed to prove damages resulting from the Candlers' breach of fiduciary duty, was not entitled to relief on his claim for constructive fraud, and was not entitled to attorney fees under the Crime Victims Statute. However, the trial court improperly concluded Ferguson was not entitled to damages for destruction of the doors, and we remand with instructions that the trial court award Ferguson damages on that claim in the amount of \$1,187.70. We also remand with instructions that the trial court enter findings and conclusions on 1) whether the Candlers complied with the trial court's

¹⁰ We also note the trial court suggested it would have disregarded the statute of limitation by applying the doctrine of continuous wrong, see C & E Corp. v. Ramco Indus., Inc., 717 N.E.2d 642, 644 (Ind. Ct. App. 1999) (explaining that, under the doctrine, "the statutory period commences at the end of the continuing wrongful act"), as it characterized Ferguson's conduct of raising the rent as an "ongoing breach," appellant's supp. app. at 55. That doctrine is not applicable here because Charles was aware of Ferguson's possible breach by 1990 at the latest, see tr. at 443-444 (Charles testifying that around 1989 or 1990, Ferguson told him "that if the salaries go up then the rents go up"), and "the doctrine of continuing wrong will not prevent the statute of limitations from beginning to run when the plaintiff learns of facts which should lead to the discovery of his cause of action even if his relationship with the tortfeasor continues beyond that point," C & E Corp., 717 N.E.2d at 646; cf. Bambi's Roofing, Inc. v. Moriarty, 859 N.E.2d 347, 356 (Ind. Ct.

September 29, 2003, order and, if not, to determine Ferguson's damages and 2) whether the Candler's are entitled to damages based on Ferguson's breach of fiduciary duty, recognizing that such damages are time-barred before June 2, 2000. On remand, the trial court need not conduct a hearing if it so chooses.

Affirmed in part, reversed in part, and remanded with instructions.

BAKER, C.J., and RILEY, J., concur.

App. 2006) ("[T]he law does not require a smoking gun in order for the statute of limitations to commence.").